88-678

No.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

IRVIN H. ROBERTS, JR. - - - - - **Petitioner**

versus

DONALD RAY HARDIN - - - - - **Respondent**

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In *Celotex Corp.* v. *Catrett,* 477 U.S. 317 (1986), the United States Supreme Court held that the burden on a party moving for summary judgment consists of ". . . pointing out to the District Court . . . that there is an absence of evidence to support the non-moving party's case."

The Sixth Circuit Court of Appeals held in *Hardin* v. *Roberts,* No. 87-5791, Opinion filed July 15, 1988, that the facts in the case, when viewed in the light most favorable to Respondent, did not support the District Court's grant of Petitioner's Motion for Summary Judgment. Petition for Rehearing En Banc was denied on September 1, 1988. The question thus presented is:

Whether the Sixth Circuit misapplied the *Celotex* standard for summary judgment by requiring Petitioner to present evidence negating every aspect of Respondent's claim and permitting Respondent to rest upon the mere allegations and denials of his pleadings?

PARTIES TO THE PROCEEDING

All of the parties to the proceeding in the court whose judgment is sought to be reviewed are named in the caption of this Petition as filed in this Court.

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IRVIN H. ROBERTS, JR. - - - - *Petitioner*

v.

DONALD RAY HARDIN - - - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioner herein respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this matter on July 15, 1988, and the order denying his Petition for Rehearing En Banc, entered on September 1, 1988.

OPINIONS BELOW

The July 15, 1988 opinion of the Court of Appeals for the Sixth Circuit, which is sought to be reviewed herein, is unreported and is reprinted in the Appendix to this Petition, pp. 1a-5a. The September 1, 1988 Order of the Court of Appeals, denying Petitioner's Petition for Rehearing En Banc, is unreported and is

reprinted in the Appendix to this Petition, p. 6a. The prior Memorandum Opinion and Judgment of the United States District Court for the Western District of Kentucky, entered June 12, 1987, is also unreported and is reprinted in the Appendix to this Petition, pp. 7a-8a.

JURISDICTION

The judgment of the Court of Appeals was entered July 15, 1988. The Order denying the Petition for Rehearing En Banc was entered September 1, 1988. The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the first section of the Fourteenth Amendment to the Constitution of the United States, which provides as follows:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction, the equal protection of the laws.

This case also involves the Fourth, Fifth, Sixth and Eighth Amendments to the Constitution of the United States, which provide, respectively:

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment VIII

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The case also involves Title 42, United States Code, Section 1983, which provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizens of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and the laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The case also involves Section 413.140(1)(a), Kentucky Revised Statutes, which provides as follows:

> (1) The following action(s) shall be commenced within one (1) year after the cause of action accrued:
>
> (a) An action for an injury to the person of the plaintiff, or of her husband, his wife, child, ward, apprentice or servant.

STATEMENT OF THE CASE

This is a civil rights action originally brought by Donald Ray Hardin pursuant to 42 USC §1983, 28

USC §1343(3)(4), and 28 USC §1331. Plaintiff filed his Complaint on December 4, 1986, alleging that Defendant acted maliciously and in bad faith ". . . in order to falsify and fabricate evidence to be use [sic] against Plaintiff . . . all under color of state law, and in violation of Plaintiff's constitutional rights." The case was assigned to the Honorable Charles M. Allen, Senior Judge, United States District Court for the Western District of Kentucky at Louisville.

The action originated in an automobile accident which occurred on October 29, 1983, in Jefferson County, Kentucky. On that evening, officers of the Jefferson County Police Department were dispatched to the scene of the accident. Upon arrival they found that Mr. Hardin's car had collided with another vehicle. The second vehicle was engulfed in flames, and the occupants were killed. Mr. Hardin also sustained injuries.

Among those present at the scene was Petitioner, Jefferson County Police Officer Irvin H. Roberts, Jr., Defendant below. Officer Roberts had been sent to the scene to assist in the investigation of the accident. While conducting his investigation, Officer Roberts retrieved a number of objects strewn about the scene and placed them in Mr. Hardin's vehicle, believing them to have been ejected therefrom. Among those objects were two to three cans of beer. Officer Roberts did not have the cans marked, photographed or entered into evidence, but noted their presence on the arrest warrant which he filed on November 3, 1983.

As a consequence of the injuries he sustained, Mr. Hardin was hospitalized until November 14, 1983. On the date of Mr. Hardin's release from the hospital he was served ~~with the~~ November 3, 1983 arrest warrant, which contained the information that *empty* beer cans had been found *on the floor* of his car.

At a probable cause hearing held December 9, 1983, Officer Roberts underwent questioning about the beer cans by the prosecutor and Mr. Hardin's counsel. At that hearing, however, his testimony was drastically different than his statement in the warrant. He stated on December 9, 1983, that he found only *full* beer cans at the accident scene, one being *in* the car and one *outside*. Upon determination by the presiding judge that there was probable cause to believe that an indictable offense had been committed by Mr. Hardin, the case was submitted to the grand jury. Officer Roberts was not questioned about the beer cans at the Grand Jury Proceedings held on January 23, 1984, February 7, 1984, or February 27, 1984. On the latter date, Mr. Hardin was indicted on two counts of murder, public intoxication and reckless driving.

Officer Roberts was again questioned about the beer cans at the trial of the case, commencing on December 5, 1985. He again indicated that he erroneously failed to have the cans marked, photographed and entered into evidence. He acknowledged that this was not standard police procedure, but an omission on his part. He further testified that after retrieving the cans, he placed them in Mr. Hardin's car, believing from their proximity to the vehicle that they, along

with other debris, had been ejected, on impact, from the car.

Mr. Hardin was subsequently acquitted of the charges against him. He initiated this civil rights action on December 4, 1986, nearly one year after the conclusion of the criminal trial, and some three years after the cause of action accrued. On April 29, 1988, Officer Roberts filed a Motion for Summary Judgment with the trial court in which he argued that Mr. Hardin's claim was barred by the one year personal injury limitations period contained in KRS 413.140(1)(a), and made applicable to civil rights actions by operation of the rule announced in *Wilson* v. *Garcia*, 471 U.S. 261 (1985). That motion was granted on June 12, 1987, and the action was dismissed with prejudice.

On July 9, 1987, Mr. Hardin filed an appeal in the Sixth Circuit Court of Appeals from the decision of the United States District Court. On July 15, 1988, the Sixth Circuit reversed the dismissal of Mr. Hardin's Complaint by the District Court, holding that Mr. Hardin could not have ascertained by what means the beer cans were deposited in his car, since he was unconscious at the scene of the accident and Officer Roberts twice testified that he found the cans in the car. Viewing the evidence in the light most favorable to the non-moving party, the Court concluded that the District Court erred in dismissing Mr. Hardin's Complaint, and remanded the case for further development of the record. A Petition for Rehearing En Banc was denied by the Sixth Circuit Court of Appeals on Sep-

tember 1, 1988. Petitioner seeks review of these decisions of the Sixth Circuit Court of Appeals.

REASONS FOR GRANTING THE WRIT

It is respectfully submitted that, in reversing the decision of the District Court, the Court of Appeals misapplied the standard for summary judgment established by this Court in *Celotex Corporation* v. *Catrett,* 477 U.S. 317 (1986). In *Celotex,* this Court held squarely that the movant in a summary judgment motion has no duty to demonstrate the total absence of *any* contested fact by presenting evidence negating *every* aspect of Respondent's claim. The movant need only demonstrate that ". . . there is an absence of evidence to support the non-moving party's case . . ." by identifying those portions of the record he or she believes show a lack of a genuine issue. This Court further held in *Celotex* that, in order to avoid summary judgment, the non-moving party must produce evidence ". . . [designating] specific facts showing that there is a genuine issue for trial." *Celotex,* 477 U.S. 317, 324. Petitioner demonstrated the absence of any evidence in the record in support of Respondent's contention that he exercised due diligence in pursuing his claim, and was, therefore, entitled to summary judgment under the *Celotex* standard. Respondent failed to designate specific facts or proffer even a scintilla of evidence in support of that contention. Respondent's complete failure to designate specific facts showing that there was a genuine issue for trial should have resulted

in the District Court's judgment being affirmed. Respondent's Complaint should have been dismissed.

Based on the foregoing, it appears that the Sixth Circuit Court of Appeals "has decided a federal question in conflict with applicable decisions of this Court." Rule 17.1(c), Rules of the Supreme Court of the United States.

In 1986, the United States Supreme Court issued three opinions, the clear intent of which was to encourage lower courts to apply a more liberal standard in granting motions for summary judgment. These cases, *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986), *Celotex Corp.* v. *Catrett*, 477 U.S. 317 (1986), *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242 (1986), signalled a departure from the somewhat harsh view of summary judgment the Court had previously taken. In keeping with a broader trend toward aggressive pre-trial disposition of cases, the Court made clear that the use of the motion is not only permitted, but encouraged. Thus, in *Matsushita, Celotex* and *Anderson,* the United States Supreme Court reversed the decisions of the Court of Appeals, which overturned the federal district court's grant of summary judgment, and remanded the cases for entry of summary judgment on behalf of movants. The Court opined:

> Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just,

> speedy, and inexpensive determination of every action." *Celotex, supra* at p. 327.

It is with this line of cases, which creates a higher threshold for nonmovants to survive summary judgment, that the decision of the Sixth Circuit Court of Appeals conflicts.

Carefully delineating the parties' respective burdens, the Court stated in *Celotex* that the movant need only inform the district court of the basis for its motion and identify those portions of the record he or she believes show a lack of genuine issue. This is a relatively light burden. There is no preliminary burden on the movant to produce evidence showing an absence of a genuine issue. Movant's burden is discharged by directing the court's attention to gaps in the record, demonstrating that there is an absence of evidence to support the nonmovant's case. *Id.*, at 323.

If the movant carries the initial burden of showing that the pleadings, depositions, answers to interrogatories, admissions and affidavits in the record, construed in a manner favorable to the nonmovant, do not raise a genuine issue of material fact for trial under Fed. R. Civ. P. 56(c), the burden shifts to the nonmovant to show the impropriety of summary judgment by coming forward with specific facts demonstrating the existence of a genuine dispute under Fed. R. Civ. P. 56(e). It is not enough for the nonmovant to "rest upon the mere allegations or denials of the adverse party's pleadings." Fed. R. Civ. P. 56(e). Rather, he or she must go beyond the pleadings and, by affi-

davit or by "depositions, answers to interrogatories, and admissions on file," designate "specific facts" showing that there is a triable issue. This is undoubtedly a much higher burden than was previously imposed on the nonmovant. It is not enough that the nonmovant establish that there is ". . . some metaphysical doubt as to the material facts." *Matsushita, supra* at 586.

If the nonmovant fails to come forward with specific facts demonstrating the existence of a genuine dispute as to an essential element of his or her case, entry of summary judgment is appropriate. *Celotex, supra* at 322. *Celotex, Id.,* the Court held:

> The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

The standard for summary judgment is likened to that of a trial motion for directed verdict. Failure of proof by the nonmovant on an element of his or her case entitles movant to judgment as a matter of law. "Where the record as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita, supra* at 587.

In *Celotex,* as in *Matsushita* and *Anderson, supra,* the Court of Appeals reversed the grant of summary

judgment, finding that the movants failed to support their motion with evidence which negated the non-movant's claim. The standard thus applied was a strict one, which the Supreme Court subsequently found to be inconsistent with the principal of aggressive pre-trial disposition of cases. It is apparent that the Sixth Circuit applied this strict standard in denying Petitioner's Motion for Summary Judgment. The court failed to heed the emerging standard for granting summary judgment announced in these cases. It is for this reason that Petitioner seeks a reevaluation of his Motion through the prism of this more liberal standard.

Petitioner's Motion for Summary Judgment was premised on Respondent's failure to initiate his action within the one-year statute of limitations, provided for in KRS 413.140(1)(a) and made applicable to civil rights actions by operation of the rule announced in *Wilson* v. *Garcia,* 471 U.S. 261 (1985). In *Wilson* v. *Garcia,* the Supreme Court held that in actions arising under 42 U.S.C. §1983, a federal court should "borrow" the personal injury statute of limitations of the state in which it sits. State law also controls questions of tolling.

Under Kentucky law, the statute of limitations begins to run at the "time of discovery." *Hackworth* v. *Hart,* Ky., 474 S.W. 2d 377, 379 (1971). The "time of discovery" rule provides that the statute of limitations "begins to run on the date of discovery on injury, *or from the date that it should, in the exercise of or-*

dinary care and diligence, have been discovered." Id. (Emphasis added) The cases are uniform in holding that protection must be afforded the "blamelessly ignorant plaintiff," *Tomlinson* v. *Siehl,* Ky., 459 S. W. 2d 166, 167 (1970), where his or her injury is "inherently unknowable," as for example, where a surgeon has performed an ineffective sterilization procedure, *Tomlinson, supra,* or has negligently failed to remove a sponge from his patient's body while performing surgery, *Ayers* v. *Morgan,* Pa., 397 Pa. 282, 154 A. 2d 788 (1959), cited in *Tomlinson, supra,* at 167. In these instances, discovery of the injury or wrong is virtually impossible until it becomes "physically ascertainable." *Tomlinson, supra.* However, the courts are not sympathetic to those plaintiffs who fail to diligently pursue, or simply overlook the existence of, their claims.

In *McSurely* v. *Hutchison,* 823 F. 2d 1002 (6th Cir. 1987), cert. denied — U.S. — (1988), the Sixth Circuit Court of Appeals dismissed plaintiff's claim, which is analogized to a claim prosecuted under 42 U.S.C. §1983, because it was not filed within one year of the date on which he became aware, or should have become aware of his injury. Plaintiff, who alleged that he had been wronged by an FBI agent in the conduct of an investigation, argued that "he did not have information sufficient to put him on inquiry notice and awareness of the person responsible for his injury," until he deposed him eight months prior to filing suit. *McSurely, supra,* at 1004. The court disagreed and adopted the reasoning of the trial court in

concluding that the limitations periods began to run against plaintiff more than one year prior to the filing of his complaint.

Similarly, in *Drake* v. *B.F. Goodrich Co.*, 782 F. 2d 638 (6th Cir. 1986), a personal injury and wrongful death action against an employer for injuries sustained by employees exposed to vinyl chloride in their work environment, the Sixth Circuit affirmed the judgment of the trial court dismissing plaintiffs' claims on grounds that they were not filed in a timely fashion. The court concluded that plaintiffs knew of their injuries, and the reasons for them, in 1973 and 1974, but failed to file suit until 1981 and 1982. The Court cited a Kentucky case for the proposition that the statute of limitations begins to run from the date "the plaintiff discovers or in the exercise of reasonable diligence should have discovered not only that he has been injured, but also that his injury may have been caused by the defendant's conduct." *Louisville Trust Co.* v. *Johns-Manville Products Corp.*, Ky., 580 S.W. 2d 497, 501 (1979).

The Court was not persuaded by plaintiff's argument that they did not know that they had actionable claims until they consulted with an attorney, observing that "the date with which the statute begins to run 'obviously . . . must be with the discovery that a wrong has been committed and not that the party may sue for the wrong.' " *Drake, supra* at 641 citing *Conway* v. *Huff*, Ky., 644 S.W. 2d 333 (1983). In both of these actions, lack of ordinary care and dili-

gence on the part of the plaintiffs proved fatal to their claims.

The present action is closely analogous to *McSurely* and *Drake* in that Respondent failed to diligently pursue his claim once his alleged injury became manifest. As the trial court noted in its Memorandum Opinion and Judgment:

> Plaintiff was clearly put on notice on November 14, 1983, the date Plaintiff was served with an arrest warrant, that empty beer cans had been placed in his automobile. Further, Plaintiff could, through the exercise of ordinary care and diligence, have discovered whether or not he had been wronged on December 9, 1983 [at the probable cause hearing] . . . At the hearing Plaintiff cross-examined Defendant and had ample opportunity to determine the fact that Defendant placed beer cans in Plaintiff's car.

Contrary to Respondent's assertions, his "injury" was by no means inherently unknowable, given the clear language of the warrant. Neither psychic powers nor unremitting cynicism were needed to resolve the apparent mystery. Only ordinary care and diligence were required. Respondent discovered, or through the exercise of ordinary care and diligence, should have discovered on November 14, 1983, or alternatively, no later than December 9, 1983, that he had been "injured" and that his "injuries" may have been caused by the Petitioner's conduct. This is when his cause of action accrued. Because nearly three years lapsed be-

fore Plaintiff initiated this action, it is clearly barred by the applicable one-year statute of limitations.

It is Petitioner's position that Respondent's cause of action accrued on November 14, 1983, when he was served with a criminal complaint and arrest warrant, the text of which specifically stated that there were *empty* beer cans *on the floor* of his car. Respondent has always maintained, and continues to maintain, that there were no cans, empty or full, in his vehicle at the time of the accident. Nevertheless, he became aware on the date the warrant was served that an allegation had been made by Officer Roberts that beer cans had been found on the floor of his automobile. Certainly, on that date (i.e. November 14, 1983) he discovered that he had been "wronged" by the person who placed the cans in his vehicle. The clock began to tick.

Confronted with this "wrong", Mr. Hardin had a duty under Kentucky's statutory and case law to exercise ordinary care and due diligence in attempting to ascertain the identity of the "wrongdoer" for purposes of initiating his action. Instead, the record indicates that he failed to exercise due diligence. Indeed, there is not a scintilla of evidence of any diligence on the part of the Respondent contained in the record. Respondent simply sat on his purported civil rights as the criminal case proceeded. Even though Officer Roberts substantially changed his testimony at the December 9, 1983, hearing (stating that the cans were *full* instead of empty and that one was in and one was

out of the car) Respondent has cited not a single effort to comply with his burden of diligent investigation.

Petitioner fully supported his Motion for Summary Judgment by pointing out to the District Court that the record is devoid of evidence showing that there is a genuine issue of fact regarding Respondent's diligence. He thereby affirmatively established that Respondent failed to initiate the instant action within the one-year statute of limitations provided for in KRS 413.140(1)(a). Simply stated, there is *no* evidence in the record that Respondent attempted to actively pursue his civil rights claim until nearly one year after his criminal trial and some three years after he discovered the alleged wrong. In support of his motion, Petitioner relied primarily upon the Respondent's pleadings and answers to interrogatories, pursuant to Federal Rule of Civil Procedure 56. He discharged his burden, as moving party, by showing that there is an absence of any evidence to support the non-moving party's case.

In *Adickes* v. *S. H. Kress & Co.,* 298 U.S. 160 (1970), the United States Supreme Court held that the party opposing a motion for summary judgment carries the burden of responding after the moving party has discharged its burden of coming forward with proof of the absence of a genuine issue of material fact. Elaborating on this rule, the Supreme Court held, in *Celotex, supra,* that movant must show the impropriety of summary judgment by coming forward with specific facts demonstrating the existence of a

genuine dispute. Something more than a "metaphysical doubt" is required.

Mr. Hardin failed to carry his burden of responding by submitting affidavits or other suitable materials designating specific facts showing that there was a genuine triable issue as to whether he exercised due diligence in pursuing his claim. Fed. R. Civ. P. 56(C). In spite of the admonitions contained in *Celotex,* Respondent was content to rest upon the allegations of his pleadings. Although Mr. Hardin filed an affidavit with his trial court brief, he failed to set forth any specific facts showing a genuine issue for trial in that affidavit. Indeed, the affidavit did little more than recite the undisputed facts already in evidence.

Mr. Hardin's affidavit failed completely to make a showing sufficient to establish that he exercised due diligence in attempting to determine the identity of the person who placed the beer cans in his car, in order to pursue his claim in a timely fashion. It failed to state why the November 14, 1983 arrest warrant and complaint, which contained allegations which were factually inconsistent with his own account of the accident, and startingly inconsistent with Officer Roberts' December 9, 1983, testimony, did not prompt an investigation. It failed to state why the testimony presented at the December 9, 1983 probable cause hearing did not provide an occasion for thorough inquiry and questioning of the most obvious first witness, Officer Roberts, or any of a multitude of other obvious potential witnesses.

Respondent's affidavit did not detail a single effort to identify the "wrongdoer," let alone mention that an investigation of any sort had even been initiated, witnesses questioned, or any other method employed which would have tolled the statute of limitations. In short, Plaintiff's affidavit failed to state any reason why he should not have discovered on either November 14, 1983, or, alternatively, December 9, 1983, that the beer cans were placed in his car by a person other than himself, and the identity of that person. Surely, a rational trier of fact could not find for the Respondent on this issue, given his complete failure of proof. This complete failure of proof on an essential element of Respondent's case renders all facts immaterial. Petitioner, therefore, was and is entitled to summary judgment on this issue.

As Petitioner observed below, in a world of absolutes all actions could easily be characterized as good and evil, and the actors heroes and villains. As a practical matter, however, human conduct does not lend itself to such easy classification. The Sixth Circuit Court of Appeals, apparently persuaded by Respondent's allegation that Petitioner was impelled by dark and furtive motives to criminally implicate him in the tragic events which gave rise to this action, reversed the decision of the District Court and remanded the case for further development of the record, with respect to the alleged deprivation of Respondent's civil rights. It is respectfully submitted that the Sixth Circuit may have been disinclined to affirm the District

Court's grant of summary judgment. Consistent with the principle that "Bad cases make bad law," the Court of Appeals misapplied the *Celotex* standard, focusing on the ostensibly "outrageous" conduct of the Petitioner.

It is not now, nor was it ever, the desire of the undersigned to attempt to absolve Petitioner from wrongdoing. The fault of the Petitioner and Respondent is not the issue herein presented. This suit is time barred by the one year statute of limitations for personal injury actions made applicable to claims enforceable under §1983 by operation of the rule announced in *Wilson* v. *Garcia,* 471 U.S. 261 (1985). Petitioner's motives, good or evil, have no more bearing on the present disposition of the case than does the alleged negligence of Respondent in causing the original motor vehicle accident. Petitioner affirmatively established that Respondent failed to initiate the instant action within the one year period of limitations, and is therefore entitled to judgment as a matter of law.

"The plain language of Rule 56(c) mandates the entry of summary judgment after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to established the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex, supra* at 322. In *Anderson, supra,* the court went so far as to say that a non-movant, although entitled to all reasonable inferences, cannot

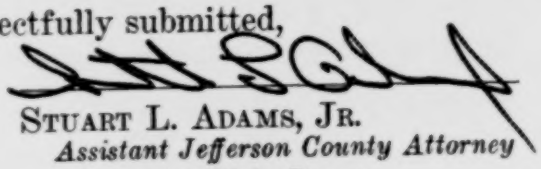
rest on a scintilla of evidence, inasmuch as summary judgment can be granted even if there is such a scintilla of evidence in the record. Indeed, summary judgment should be granted if the pretrial evidence is "merely colorable" or "is not significantly probative." Here there is no scintilla of evidence in support of Respondent's claim, and summary judgment is mandated.

Where the facts of a case are undisputed, the validity of limitations defense is a question of law properly within the province of the trial court. *Lynn Mining Co.* v. *Kelly,* Ky., 394 S.W. 2d 755 (1965); *Northwestern National Insurance Co.* v. *Osborne,* 573 F. Supp. 1045 (E.D. Ky. 1983). The trial court's decision that an action is time-barred will generally be disturbed only upon a clear showing of an abuse of discretion. Given the mandate of this Court in *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp., Celotex Corp.* v. *Catrett, Anderson* v. *Liberty Lobby, Inc.,* and their progeny, Petitioner respectfully submits that the trial court did not abuse its discretion in granting his Motion for Summary Judgment, but that the Sixth Circuit erred in reversing that decision.

CONCLUSION

For all of these reasons, and upon the authorities cited and argued in this, his Petition, the Petitioner respectfully prays that a writ of certiorari be granted.

Respectfully submitted,



STUART L. ADAMS, JR.
Assistant Jefferson County Attorney
621 West Main Street
Louisville, KY 40202
(502) 587-7711

Counsel for Petitioner

CERTIFICATE OF SERVICE

I, STUART L. ADAMS, JR., a member of the Bar of this Court, representing the Petitioner herein, hereby certify that I have, this the 23rd day of November, 1988, served the foregoing Petition for Writ of Certiorari, pursuant to Rule 28.3 of this Court, upon all parties required to be served, to-wit: Daniel T. Taylor, III, by depositing three (3) copies of the said Petition in a United States mailbox, with first-class postage prepaid, addressed to Daniel T. Taylor, III, Counsel for Respondent, 1052 Bardstown Road, Louisville, Kentucky 40204, and by hand delivery to William T. Warner, 621 West Main Street, Louisville, Kentucky 40202, Counsel for Petitioner.

STUART L. ADAMS, JR.

APPENDIX

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 87-5791

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DONALD RAY HARDIN, - - - *Plaintiff-Appellant,*

v.

IRVIN H. ROBERTS, JR., - - - *Defendant-Appellee.*

On Appeal from the United States District Court for the Western District of Kentucky

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OPINION AND ORDER—Filed July 15, 1988

BEFORE:- LIVELY and JONES, Circuit Judges; and BROWN, Senior Circuit Judge.

PER CURIAM. Plaintiff-appellant Donald Ray Hardin appeals the district court's judgment dismissing, with prejudice, his claim under 42 U.S.C. § 1983 as untimely filed under the applicable statute of limitations. Upon consideration, we find that the district court erred in dismissing Hardin's complaint on this ground. Therefore, we reverse and remand this case for further development of the record with respect to the alleged deprivation.

I.

On October 29, 1983, plaintiff-appellant, Donald Ray Hardin, was the driver of a vehicle involved in a collision in Jefferson County, Kentucky. Two persons in the automobile that collided with Hardin's car were killed and

Hardin himself was knocked unconscious as a result of the accident. Among those present at the scene was defendant-appellee, Irvin H. Roberts, Jr., a Jefferson County Police Officer. Roberts had been dispatched to the scene to assist in the investigation of the accident. In addition to Roberts, one other police officer was at the scene, as were volunteer firemen and emergency medical personnel. In conducting the investigation, defendant Roberts evidently retrieved a number of objects strewn about the scene and placed them in Hardin's vehicle, from which he stated he believed them to have been ejected on impact. Among these objects were two or three empty beer cans.

Several days later, on November 3, 1983, Roberts secured an arrest warrant against Hardin on charges of second degree manslaughter, first degree wanton endangerment, drunkenness in a public place, and reckless driving. In securing the warrant against Hardin, Officer Roberts swore that:

> when officers arrived at the scene, [Hardin] smelled strongly of alcohol and there were empty beer cans on the floor of [Hardin's] car.

J. App. at 36. Hardin, who was hospitalized until November 14, 1983, because of his injuries in the accident, was served with the arrest warrant on the date of his release from the hospital.

Subsequently, on December 9, 1983, as probable cause hearing was held regarding the charges filed against Hardin. At this hearing, Officer Roberts confirmed his earlier statement made in the warrant that beer cans were found in Hardin's car, and underwent questioning about the beer cans by Hardin's defense counsel. There was also evidence introduced regarding blood alcohol work-ups conducted on Hardin at Humana Hospital, where he was trans-

ported for treatment, which revealed a .28 alcohol level at the time of the accident. Upon determination by the presiding judge that there was probable cause to believe that an indictable offense had been committed by Hardin, the case was submitted to the grand jury. Officer Roberts was not questioned about the beer cans at the grand jury proceedings held on January 23, 1984, February 1, 1984, or February 27, 1984. On the last of these dates, Hardin was indicted on charges of murder (two counts), public intoxication, and reckless driving.

Officer Roberts was again questioned about the beer cans at the trial of the case, commencing on December 5, 1985. At that time, Roberts admitted that the cans had not been found inside of Hardin's car, but that he [Roberts] had placed them there, believing that the cans had been ejected from Hardin's car as a result of the crash. Roberts acknowledged that this was not standard police procedure, but a mistake on his part.

Subsequently, Hardin was acquitted of the charges against him. On December 4, 1986, he initiated this section 1983 action alleging, *inter alia*, that Officer Robert's actions in placing the beer cans in his car were "intentionally done, with malice and in bad faith . . . in order to falsify and fabricate evidence to used [sic] against [Hardin] . . . all under color of state law, and in violation of [Hardin's] constitutional rights." J. App. at 3-4. Hardin also alleged in his complaint that Roberts's planting of beer cans in his car was "fraudulently concealed by [Roberts] until December 6, 1985" when Roberts admitted his wrongdoing for the first time at Hardin's criminal trial. *Id.* at 4.

On April 29, 1987, Roberts filed a motion for summary judgment with the trial court in which he argued that Hardin's claim was barred by the one-year personal injury limitations period contained in Kentucky Revised Statutes ("KRS") 413.140(1)(a), and made applicable to section

1983 actions by operation of the rule announced in *Wilson* v. *Garcia*, 471 U.S. 261 (1985). Roberts argued in his motion that Hardin, who had maintained all along that there were no beer cans in his car when the accident occurred, should have discovered in the exercise of reasonable diligence by no later than November 14, 1983, that beer cans had been placed in his car on the night of the accident. On that date (November 14), Hardin was served with the arrest warrant indicating that beer cans had been found, and Roberts argued that Hardin *then* became obligated to make an inquiry as to how the cans got there.

The district court, in a Memorandum Opinion, granted Roberts's summary judgment motion. The court agreed with Roberts's argument that, on the date Hardin was served with the arrest warrant, he was clearly put on notice that someone had placed beer cans in his automobile. J. App. at 9. In addition, the court concluded that Hardin, through the exercise of reasonable diligence, could have discovered whether or not he had been wronged by Officer Roberts on December 19, 1983, the date the probable cause hearing was held. On that date, the court said, Hardin "cross-examined defendant and had ample opportunity to determine the fact that Defendant placed beer cans in plaintiff's car." *Id.* at 9-10. Accordingly, the district court concluded that Hardin's claim against Roberts accrued no later than December of 1983, and was therefore not filed within the one-year limitations period. Hardin filed this timely appeal.

II.

The parties are in agreement that the one-year personal injury limitations period contained in KRS 413.140(1)(a) applies to this section 1983 action by virtue of the rule announced in *Wilson* v. *Garcia*, 471 U.S. 261 (1985). The

parties further agree that the "time of discovery" rule articulated in *Hackworth* v. *Hart,* 474 S.W. 2d 377 (Ky. 1971) governs the question of when Hardin's cause of action accrued. Our sole inquiry is whether the district court erred in concluding via summary judgment that Hardin either discovered, or through the exercise of reasonable diligence should have discovered, his alleged injury prior to December 4, 1985.

Summary judgment is proper only when (1) the pleadings, depositions, affidavits or other material permitted by Rule 56(c) show that there is no disputed issue of material fact, and (2) on the agreed facts, the moving party is entitled to prevail as a matter of law. Fed. R. Civ. P. 56(c). A statute of limitations defense is properly asserted in a motion for summary judgment, and should be granted if the action clearly is barred. But, if the running or tolling of the statute requires the adjudication of issues of fact, the motion should be denied. C. Wright & A. Miller, *Federal Practice and Procedure,* § 2734 at 407-08 (1983). In reviewing summary judgment for the defendant, this court must view the entire record in the light most favorable to the plaintiff. *Sequoyah* v. *Tennessee Valley Authority,* 620 F. 2d 1159 (6th Cir. 1980).

Under this standard, the district court erred in concluding that Hardin's action was barred by the applicable statute of limitations. Officer Roberts twice swore that the beer cans were found inside Hardin's car by police officers, and did not admit that he placed them there until the trial of the case on December 6, 1985. Given that Hardin was unconscious when Roberts put the beer cans in his automobile, and that Roberts confirmed his earlier statement under questioning at the probable cause hearing, we find it difficult to understand by what means Hardin was to ascertain had the cans arrived in his car. In any event, *when viewed in the light most favorable to Hardin,*

the facts in this case do not support the district court's grant of defendant's motion for summary judgment.

For the reasons stated herein, we conclude that the district court's grant of defendant's summary judgment motion was in error. We therefore REVERSE and REMAND this case for further development of the record with respect to the alleged deprivation.

No. 87-5791

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DONALD RAY HARDIN, - - - *Plaintiff-Appellant,*

v.

IRVIN H. ROBERTS, JR., - - - *Defendant-Appellee.*

ORDER—Filed September 1, 1988

BEFORE: LIVELY and JONES, Circuit Judges, and BROWN, Senior Circuit Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

Entered by Order of the Court

(s) Leonard Green
Leonard Green, Clerk

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action C 86-0915-L(A)

DONALD RAY HARDIN, - - - - - - *Plaintiff,*

v.

IRVIN H. ROBERTS, - - - - - - *Defendant.*

MEMORANDUM OPINION AND JUDGMENT

—Entered June 12, 1987

Defendant moved the Court to enter summary judgment dismissing Plaintiff's claims against Defendant on the ground that Plaintiff's claims are barred by the one-year period of limitation provided in KRS 413.140(1)(a), which is made applicable to 42 U.S.C. § 1983 claims pursuant to the rule announced in *Wilson* v. *Garcia,* 471 U.S. 261 (1985). Plaintiff responded that he could not "be positively sure, that it was Roberts who had heaved the beer cans into his automobile, until Roberts finally admitted doing so on December 6, 1985."

Plaintiff was clearly put on notice on November 14, 1983, the date Plaintiff was served with an arrest warrant, that empty beer cans had been placed in his automobile. Further, Plaintiff could, through the exercise of ordinary care and diligence, have discovered whether or not he had been wronged on December 9, 1983. On that date a hearing was held in Jefferson District Court and the Court de-

termined that there was probable cause to believe that an indictable offense had been committed. At that hearing Plaintiff cross-examined Defendant and had ample opportunity to determine the fact that Defendant placed beer cans in Plaintiff's car. Therefore, as Plaintiff's complaint was filed on December 4, 1986, this action must be dismissed because it was not filed within one-year, pursuant to the applicable period of limitation.

Accordingly,

IT IS ORDERED AND ADJUDGED that Defendant's motion for summary judgment be, and it hereby is, granted.

IT IS FURTHER ORDERED that Plaintiff's complaint be, and it hereby is, dismissed with prejudice. Each party is responsible of their own costs.

This is a final and appealable order and there is no just cause for delay.

Dated 6-12-87

(s) Charles M. Allen
Charles M. Allen, Senior Judge

cc: Counsel of Record